UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
Southern Division

In re: No. 94-12659
Chapter 7

IUANITA RUTLEDGE,

Debtor

MEMORANDUM

Appearances: Albert L. Watson, III, Chattanooga, Tennessee
Attorney for Debtor

R. Thomas Stinnett, United States Bankruptcy Judge

The debtor, Iuanita Rutledge, has filed a motion ostensibly to avoid a judicial lien. 11 U.S.C. § 522(f)(1). The motion relates to garnishments of the debtor's earnings by two creditors, Dr. F. Jones Smiley and the Hospital Authority of Walker County, Georgia. The specific relief sought is to require "the judgment creditors to deliver garnished funds to the debtor through debtor's attorney." The motion makes the following allegations:

> (1) Within the 90 days before the debtor filed bankruptcy, the debtor's employer withheld $434.18 to pay Dr. Smiley and $693.14 to pay the hospital.
>
> (2) The debtor has claimed the amounts they collected as exempt.
>
> (3) At the meeting of creditors the bankruptcy trustee stated that he would treat the case as a no-asset case and would not attempt to recover the amounts collected by the creditors.

This court has subject matter jurisdiction pursuant to 28 U.S.C. §1334 and the district court's order referring bankruptcy cases and proceedings to the bankruptcy judges pursuant to 28 U.S.C. §157. This is a core proceeding. 28 U.S.C. §157(b)(2)(B) & (F); *Washkowiak v. Glenwood Medical Group (In re Washkowiak)*, 62 B.R. 884, 15 Collier Bankr. Cas. 2d 206 (Bankr. N.D. Ill. 1986); *Michigan Employment Security Commission v. Wolverine Radio Corp.*, 930 F.2d 1132, 21 Bankr. Ct. Dec. 932, 24 Collier Bankr. Cas. 2d 1702 (6th Cir. 1991) (status of a proceeding as core or non-core depends on both its form and its substance).

Neither creditor filed a response to the motion or appeared at the hearing. Each appears to have been properly served with the moiton and to have received adequate notice of the hearing. The court raised the question of whether the motion should have been filed as a complaint under § 522(h) and § 547 to recover a preferential transfer. 11

U.S.C. §§ 522(h) & 547; FED. R. BANKR. P. 7001 & 4003(d); *Walden v. First Tennessee Bank (In re Walden)*, 19 B.R. 901 (Bankr. E. D. Tenn. 1982); *Riggsby v. Fort Oglethorpe State Bank (In re Riggsby)*, 34 B.R. 440, 37 U.C.C. Rep. Serv. 1327 (Bankr. E. D. Tenn. 1983). The court raised the question because the money had apparently been paid to the creditors before the debtor's bankruptcy. The court allowed the debtor's attorney to file a brief on the question. The brief has now been filed.

The question is whether, even though the creditors failed to appear or otherwise defend, the court should grant the motion without specific reference in the motion to § 522(h) and the preference statute. The procedure that was used by debtor insured that the creditors received adequate notice of the claim and had an opportunity to defend.

Because the debtor filed a motion instead of a complaint, this does not mean that the court must deny the motion. Further, it does not mean that the debtor must start the process anew by having the motion restyled as an adversary proceeding and having summonses issued to the creditors. Failure to follow the correct procedure does not necessarily prejudice the opposing parties. This is particularly true with regard to motions that begin contested matters under the bankruptcy rules. Certainly, many of the rules that apply to adversary proceedings (complaints) also apply to contested matters (motions). FED. R. BANKR. P. 9014; *In re Klingbeil*, 119 B.R. 178, note 1 (Bankr. D. Minn. 1990); *In re Zobenica*, 109 B.R. 814, 816, 22 Collier Bankr. Cas. 2d 364 (Bankr. W.D. Tenn. 1990).

A plaintiff's claim may not have any basis in the law or the true facts. Nevertheless, a plaintiff can reduce the claim to writing, pay a filing fee, file it, and serve it upon the respondent. The respondent or defendant is then required to defend or suffer the consequences. A court should not automatically grant a judgment based on a defen-

dant's failure to appear or respond; however, the court should grant a judgment based on the defendant's default if the complaint states a valid claim against the defendant and the defendant has been given proper notice and an opportunity to be heard. *Kubick v. Federal Deposit Ins. Corp. (In re Kubick),* 171 B.R. 658, 26 Bankr. Ct. Dec. 7 (Bankr. 9th Cir. 1994).

The facts stated in the motion gave the creditors clear notice of exactly which transactions were involved and what the debtor wanted to recover. The motion also included allegations relevant to recovery under § 522(h) and the preference statute. It alleged that the transfers to creditors occurred within the 90 days before bankruptcy. 11 U.S.C. § 547(b)(4). It alleged that the case was a no-asset case. 11 U.S.C. § 547(b)(5); *Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.)*, 930 F.2d 458, 24 Collier Bankr. Cas. 2d 1556 (6th Cir. 1991). It alleged that the trustee would not attempt to recover from the creditors. 11 U.S.C. § 522(h)(2). These allegations are required to recover a preferential transfer under § 522(h) and § 547, but they generally are not required when the debtor merely seeks to avoid a judicial lien under § 522(f)(1) .

The allegations also covered the other elements of a preferential transfer, except for an allegation that the debtor was insolvent during the 90 days before bankruptcy. The debtor's earnings were property of the debtor. The garnishments were for the benefit of the creditors. Because the transfers resulted from garnishments, the transfers obviously were made on account of antecedent judgment debts. 11 U.S.C. § 547(b)(1) & (b)(2). Although the motion failed to allege the debtor was insolvent during the 90 days before her bankruptcy, it is presumed. 11 U.S.C. § 547(b)(3) & (f).

The claim against Dr. Smiley raises a problem that is not present with regard to the claim against the hospital. Dr. Smiley may have had a valid defense under

§ 547(c)(7). A preferential transfer cannot be recovered if the debtor owes primarily consumer debts and the transfer involved less than $600. The creditor has the burden of proving a defense under § 547(c). 11 U.S.C. § 547(g). The court is not required to review the case file to determine whether the debtor owes primarily consumer debts. In this case the creditor, Dr. Smiley, has shown no interest in defending.

The court concludes that judgment for the amounts recovered on the garnishments is appropriate even though the motion failed to cite § 522(h) and the preference statute. The averments in the motion adequately support the debtor's claim.

Furthermore, there was no need for an entry of default and a motion for default judgment. They would have served no purpose and Rule 7055 did not require additional notice to the creditors before entry of a judgment. FED. R. BANKR. P. 9014 & 7055(b)(2); *Anderson v. Taylorcraft, Inc.*, 197 F.Supp. 872 (W. D. Pa. 1961); *Olsen v. International Supply Co.*, 22 F.R.D. 221 (D. Alaska 1958) (Defendant had appeared but failed to attend trial; relief from judgment depended on Rule 60). *See also Ringgold Corp. v. Worrall*, 880 F.2d 1138 (9th Cir. 1989) (The failure to give notice as required by the rule did not justify setting aside default judgment since defendants' prior actions left no doubt of their intent not to defend.); *Waifersong Ltd., Inc. v. Classic Music Vending*, 976 F.2d 290 (6th Cir. 1992) (A possible meritorious defense is not a ground for setting aside a default judgment without proof of a ground for relief under Rule 60.)

The court will enter judgment. This memorandum constitutes the court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052.

At Chattanooga, Tennessee.

BY THE COURT

_____
R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

[entered 12/5/94]

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
Southern Division

In re:

IUANITA RUTLEDGE,

Debtor

No. 94-12659
Chapter 7

ORDER

For the reasons stated in a Memorandum filed contemporaneously herewith,

It is ORDERED, ADJUDGED and DECREED that the debtor shall have and recover from Dr. F. Jones Smiley the sum of $434.18; and

It is further ORDERED, ADJUDGED and DECREED that the debtor shall have and recover from the Hospital Authority of Walker, Dade and Catoosa Counties the sum of $693.14.

ENTER:

BY THE COURT

_____
R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

[entered 12/5/94]